U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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PUBLIC COPY

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: AUG 14 2006

SRC 06 001 51555

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained and the petition will be approved.

The petitioner is a medical clinic. It seeks to employ the beneficiary permanently in the United States as a physician specializing in internal medicine pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, the petition was accompanied by certification from the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition.

On appeal, counsel submits a brief and additional evidence. The petitioner has now overcome the director's basis of denial.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on December 23, 2002. The proffered wage as stated on the Form ETA 750 is $107,575 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of November 2002.

On the petition, the petitioner claimed to have an establishment date in 1995, a gross annual income of $1,624,230.87, a net income of $135.64 and five employees. In support of the petition, the petitioner submitted compiled financial statements for 2004.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on October 31, 2005, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage for 2002 and 2003. The director also requested the beneficiary's Form W-2 Wage and Tax Statements.

In response, the petitioner submitted Form 1120 U.S. Corporation Income Tax Returns for the petitioner for the years 2002 and 2003, excluding Schedule L. The returns reflect a net income of $4,133 in 2002 and $6,758 in 2003. In addition, the petitioner submitted copies of the Forms W-2 it issued to the beneficiary in 2002, 2003 and 2004. The Forms W-2 reflect wages of $15,000 in 2002, $135,000 in 2003 and $145,000 in 2004.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on January 20, 2006, denied the petition.

On appeal, counsel asserts that the petitioner has been paying the proffered wage since the priority date. The petitioner submits its corporate tax returns for 2002 through 2004, including schedules L and the beneficiary's Form W-2 for 2005 reflecting wages of $162,091.

Where the petitioner has submitted the requisite initial documentation required in the regulation at 8 C.F.R. § 204.5(g)(2), Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the record before the director, the petitioner had not submitted the initial required documentation for 2004 and had not established that it employed and paid the beneficiary the full proffered wage in 2002. We note, however, that the director had not requested the petitioner's tax returns for 2004 in the request for additional evidence. The petitioner has now submitted the initial required evidence, federal tax returns, for 2004. Thus, we can consider the wages paid to the beneficiary in that year, which were above the proffered wage.

Regarding 2002, the priority date is December 23, 2002, eight days before the end of the year. We will not consider 12 months of wages paid towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of wages paid towards paying the annual proffered wage. In this matter, however, the beneficiary began working for the petitioner in November 2002. Thus, the Form W-2 for that year reflects only two months of wages. In these circumstances, we will prorate the proffered wage. Moreover, the petitioner compensated its shareholder $628,000 in 2002. Ordinarily, a petitioner cannot establish its ability to pay based on compensation already paid to officers of the company. The petitioner, however, is a personal service corporation. Peculiarities in the tax code create a unique circumstance for sole owners of medical service corporations. The sole owner of the corporation is clearly not earning a subsistence wage, a reduction of which would impair the owner's own ability to earn a living. The petitioner's income is ample and the petitioner's ability to pay the proffered wage is evident in its current ability to exceed that wage.

The petitioner submitted evidence sufficient to demonstrate that it had the ability to pay the proffered wage during the salient portion of 2002 and subsequently. Therefore, the petitioner has established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has sustained that burden.

ORDER: The decision of the director is withdrawn. The appeal is sustained and the petition is approved.